IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2009 Session

BRANDON WEBB v. AMY WEBB (HOLLENSWORTH)

Appeal from the Circuit Court for Davidson County
No. 05D1856 Carol Soloman, Judge

No. M2008-02039-COA-R3-CV - Filed October 14, 2009

Mother appeals the trial court's order granting Father's petition to modify the parenting plan upon a finding that a material change in circumstances had occurred and that modification was in the best interest of the child. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Ray Akers, Nashville, Tennessee, for the appellant, Amy Webb (Hollensworth).

James L. Curtis, Nashville, Tennessee, for the appellee, Brandon Webb.

OPINION

The parties were married in March 2003, following the birth of their child and divorced in October 2005. The final divorce decree adopted the parties' Marital Dissolution Agreement and Permanent Parenting Plan, which provided that the parties would have equal parenting time on a schedule they both agreed to or, if no agreement could be reached, the child would "reside with one parent for one week and the other parent for the following week alternating."

In the year after the final divorce decree, Mother and Father apparently shared parenting time without much incident; in the summer of 2006, Mother persuaded Father to allow her to enroll the child in a Head Start program near Mother's residence in Gordonsville, Tennessee, instead of the Head Start program in Lebanon, Tennessee, that the child had previously attended. It was also around this time that Father's visitation with the child was reduced to every other weekend.

After the parties' divorce, Mother became romantically involved with a man who abused her at times. At some point in the Fall of 2007, Mother's boyfriend assaulted her, choking her in the presence of the child. Mother fled to a domestic violence abuse shelter and took out an order of protection against her boyfriend. While at the shelter, Mother became friends with a woman who

had two minor children of her own and when Mother left the shelter she invited the woman and her children to live with her and the child. Around January 2008, Mother became romantically involved with another man and often invited him to stay overnight at her house while the child was present. Testimony at trial was that Mother allowed at least one man whom she did not date on a regular basis over to stay at her house while the child was present. Around this same time, Mother's former boyfriend violated the order of protection at least once.

On March 19, 2008, Father filed a verified petition to modify the parenting plan incorporated into the final decree of divorce. Father's petition alleged several facts that Father contended represented a material change of circumstances warranting modification of the parenting plan and that modification was in the best interest of the child. Specifically, Father alleged that Mother had placed the child in an environment that was detrimental to both the mental and physical well-being of the child; that Mother "moved from house to house and boyfriend to boyfriend" and allowed her boyfriends to stay overnight while the child was present; that Mother had been the victim of domestic violence at the hands of one of her boyfriends, which was witnessed by the child and resulted in Mother seeking an order of protection and staying temporarily at a domestic violence shelter; that Mother had a history of drug and alcohol abuse as well as erratic and psychotic behaviors; that a report had been made to the Department of Children's Services regarding bruises that Mother caused on the child's back; and that Mother caused the child to be frequently tardy or absent from preschool and Head Start.

Contemporaneously with his petition, Father filed a motion to enforce the week-to-week parenting time provided for in the Parenting Plan. Father also moved to be allowed to enroll the child in a state-approved Pre-K program in Nashville, Davidson County, while she was in Father's custody.[1] On April 14, 2008, the trial court entered an agreed order to enforce equal parenting time between the parties and on June 4, 2008, the trial court granted Father's motion to enroll the child in a Pre-K program in Nashville to attend while in Father's care.

In her Answer, Mother admitted that she had been the victim of domestic violence, that a report had been filed with DCS and that the child had missed several days of preschool and Head Start. She asserted, however, that she had acted to protect the child by seeking an order of protection and fleeing to a domestic violence shelter, that DCS had found no indication of abuse or neglect and that the child was held out of school due to illness. Mother denied the remainder of the allegations in the petition.

[1] At the time Father filed his petition, the child was enrolled in a Pre-K program in Gordonsville, Smith County, TN, where Mother resided, which is approximately 60 miles from Nashville, where Father resided. Father's motion contended that, pending the trial, it was not in the child's best interest to be transported 120 miles per day to attend a substantially similar program as one available in Nashville near Father's home.

At the trial on August 21, 2008, the court heard testimony from Father, Mother's former roommate, Mother's former boyfriend, Mother's former husband,[2] and a private investigator hired by Father. At the close of Father's proof, Mother moved for involuntary dismissal contending that Father had failed to meet his burden of proof that there was a material change of circumstances warranting modification of the parenting plan. The trial court denied Mother's motion; Mother subsequently waived her right to present proof.

The trial court entered an order on September 25, 2008, finding that "[t]here has been a significant change of circumstances since the entry of the Final Decree of Divorce that warrants a modification." The court's order was subsequently amended on December 9, 2008, finding that there had been a "substantial and material change in circumstances that greatly affected the Best Interests of the child." In the September 25 order, the trial court designated Father as the child's primary residential parent and granted Mother parenting time "on the long holiday weekends of Labor Day, Martin Luther King Day, and Memorial Day," as well as the week of spring break, two weeks in June, two weeks in July, one week in August, and Thanksgiving and Christmas holidays every other year. The trial court also restrained Mother from exercising her parenting time with the child in the presence of any person with whom she was romantically involved without the benefit of marriage.

Mother appeals, contending that the trial court erred in denying Mother's motion to dismiss Father's petition at the close of Father's proof and in subsequently finding that a material change in circumstances had occurred. Mother also contends that the trial court erred in ordering the child be enrolled in two different kindergartens. Finally, Mother contends that the trial court was biased against her for being in a wheelchair.

Analysis

Mother contends that Father failed to meet his burden of proof to show by a preponderance of the evidence that a material change in circumstances occurred since the entry of the final divorce decree. She asserts that the "facts presented at trial failed to establish that a substantial and material change in circumstances occurred **after** the prior custody order." (Emphasis in original).

A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft v. Smithson,* 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). Such an order remains within the control of the court, however, and is subject to "such changes or modification as the exigencies of the case may require." Tenn. Code Ann. § 36-6-101(a)(1).

In recognition of the fact that the circumstances of children and their parents change, which sometimes require changes in the existing parenting arrangement, both the legislature and the courts have addressed the requirements necessary to modify a residential parenting schedule. There are no

[2] Mother had been married prior to her marriage to Father.

bright line rules, but the Tennessee Supreme Court has directed courts to consider (1) whether the change occurred after the entry of the order sought to be modified; (2) whether the change was known or reasonably anticipated when the order was entered; and (3) whether the change is one that affects the child's well-being in a meaningful way. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003) (citing *Kendrick*, 90 S.W.3d at 570). The General Assembly has provided a non-exhaustive list of circumstances which might constitute a material change for purposes of modifying a residential parenting schedule including "significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C).

When a petition to change custody is filed, the parent seeking the change has the burden of showing (1) that a material change in circumstances has occurred and (2) that a change in custody or residential schedule is in the child's best interest. *Kendrick v. Shoemake*, 90 S.W.3d 566, 575 (Tenn. 2002); *Blair v. Badenhope,* 77 S.W.3d 137, 148 (Tenn. 2002); *In re M.J.H.,* 196 S. W.3d 731, 744 (Tenn. Ct. App. 2005); *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001). A finding that a material change in circumstances has occurred is a threshold inquiry that when made allows the court to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d at 150; *Cranston*, 106 S.W.3d at 644; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006). Whether modification of a residential parenting plan is in the child's best interest requires consideration of a number of factors, including those set out in Tenn. Code Ann. § 36-6-106(a) (factors to consider in custody determination). *Kendrick*, 90 S.W.3d at 570.

Whether a preponderance of the evidence showed that a material change in circumstances had occurred since the entry of the final divorce decree is a question of law, which we review *de novo* without a presumption of correctness. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569-70 (Tenn. 2002); *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). We review the trial court's findings of fact *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 570. Tenn. Code Ann. § 36-6-101(a)(2)(B) requires the trial court to make a finding as to the reason and the facts that constitute the basis for the custody determination. If the trial court made no specific findings of fact, then we must look to the record to "determine where the preponderance of the evidence lies." *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002).

Here, the final order of the trial court recited that a "substantial and material change in circumstances that greatly affected the Best Interests of the child" had occurred "since the entry of the Final Decree of Divorce that warrants a modification." The trial court modified the parenting plan "from shared parenting to designating the father as the primary residential parent" and set forth the days and times Mother would have "non-residential parenting time with the minor child." While the trial court's order did not make specific findings of fact, our review of the record shows that the trial court's conclusion was supported by a preponderance of the evidence.

At the time of the divorce, the child was two years old and the parenting plan was established based on the parties' agreement that at such a "tender" age, residential parenting time should be shared "as equally as practical" and that both parents were "fit and proper persons to parent the child" as "joint custodians of the child in all respects."[3] Since that time, the circumstances of the parties have changed. The child is now entering kindergarten requiring a more stable home life in order to attend school and establish relationships with her classmates. Moreover, while the child's life requires more stability, Mother's life has become increasingly less stable due to poor personal choices she has made with respect to the men she has become romantically involved with and whom she allows to come into contact with the child.

Mother contends that "[t]here was no proof that the child was placed in a detrimental environment and no proof that the Order of Protection had any effect on the child other than ensuring her safety." Neither the statute nor Tennessee case law require such proof in order to establish a material change in circumstances. In fact, the statute explains that "a material change of circumstance does not require a showing of a substantial risk of harm to the child." The threshold to find a material change in circumstance requires only that we look to see whether a change has affected the well-being of the child in some way. This may be merely that the existing arrangement has proven unworkable for the parties. *See Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006); *Rushing v. Rushing*, No. W2003-01413-COA-R3-CV, 2004 WL 2439309, at *6 (Tenn. Ct. App. Oct. 27, 2004); *Turner v. Purvis*, No. M2002-00023-COA-R3-CV, 2003 WL 1826223, at *4 (Tenn. Ct. App. Apr. 9, 2003); *Vaccarella v. Vaccarella*, 49 S.W.3d 307, 318 (Tenn. Ct. App. 2001).

In the present case, the original parenting plan anticipated that the parties could "agree on a residential schedule on a flexible basis." In the year or so prior to Father filing the petition, Mother decreased Father's parenting time and changed the child's school to one that was further away from Father's residence. Father testified that he was reluctant to allow Mother to make these changes, but Mother persisted and Father ultimately relented; he testified that he felt "bullied" into it. Not only were the parties having trouble agreeing on a residential schedule that was workable for them and the child, but the parenting plan, by its terms, did not address how the child's educational or other needs would be met if the parties could not agree. The parenting plan only addressed how the parties would care for the child during her "tender" years. The evidence at trial clearly showed that the existing parenting plan had become unworkable requiring a modification to address the needs of the child as she entered elementary school. In addition, the consequences of Mother's behavior and choices following the divorce were not reasonably anticipated at the time the parenting plan was entered.

While the trial court's order did not make specific findings with respect to the best interest of the child, our review of the record shows that modification was in the best interest of the child. As mentioned above, Mother's life was increasingly unstable at a time when the child was beginning elementary school and needed stability. Father showed that he could provide the stability and

[3] The quoted language is contained in the parenting plan.

supervision the child needed; consequently, the record supports the trial court's decision that modification was in the child's best interest.

Other Issues

Mother raises several other issues on appeal including whether the trial court erred in ordering the child be simultaneously enrolled in two kindergarten classes, one in Gordonsville and one in Nashville, pending the trial and in denying her motion for involuntary dismissal at the close of Father's proof. In light of our determination that the trial court's judgment should be affirmed, we find these issues are moot.

Mother also asserts on appeal that the trial court "was prejudicial against the Mother for being in a wheelchair." Mother points to a statement made during the course of the court's ruling from the bench wherein the judge stated, "I'm really concerned about the little girl and to do what all little girls do with her mother being in her wheelchair." Mother argues that "[t]his statement implies an apparent belief that a person in a wheelchair cannot be a proper parent" because "[e]ven though it is undisputed that the Mother in this suit is not wheelchair bound, this statement implies a prejudice against parents with disabilities." Upon reviewing the court's statement in the context of the entire ruling, we do not find that the statement shows a bias on the part of the trial court against Mother or parents with disabilities, generally, or that the trial court's determination was influenced in any way by the fact that Mother appeared in court in a wheelchair.

Finally, Father, citing Tenn. Code Ann. §36-5-101, asserts that he is "entitled" to an award of attorney's fees on appeal. The trial court ordered each party to pay their respective attorney's fees and Father does not appeal the trial court's order in that respect; rather, he asks this Court to remand the issue of attorney's fees on appeal to the trial court for a determination of what amount is reasonable.

Tenn. Code Ann. § 36-5-101(l)(1) provides:

> The court may, in its discretion, at any time pending the suit, upon motion and after notice and hearing, make any order that may be proper to compel a spouse to pay any sums necessary to enable the other spouse to prosecute or defend the suit and to provide for the custody and support of the minor children of the parties during the pendency of the suit, and to make other orders as it deems appropriate. In making any order under this subsection (l), the court shall consider the financial needs of each spouse and the children, and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

Id. We are directed by the statute to consider the financial needs and ability of the parties in determining whether an award of attorney's fees on appeal is appropriate. Father asserts no financial need, but merely states that "he is entitled to this." The record shows that Father has full time employment while Mother lives on disability payments and other forms of government assistance.

We do not find that an award of attorney's fees incurred by Father on appeal is appropriate in this case.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

Costs of the appeal are taxed to Mother.

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RICHARD H. DINKINS, JUDGE